DOCUMENT RESUME

ED 269 660 CG 019 045

AUTHOR Herlihy, Barbara; Sheeley, Vernon Lee
TITLE Privileged Communication: Legal Status & Ethical Issues.
PUB DATE Apr 86
NOTE 13p.; Paper presented at the Annual Convention of the American Association for Counseling and Development (Los Angeles, CA, April 20-23, 1986).
PUB TYPE Reports - Research/Technical (143) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Confidentiality; Counselor Client Relationship; *Counselors; *Court Litigation; Disclosure; *Ethics; Family Counseling; *Legal Responsibility; Marriage Counseling; Psychologists; School Counselors; Social Workers; *State Legislation

ABSTRACT

This report presents findings of research regarding extant privileged communication statutes in the 50 states for selected helping professionals: psychologists, social workers, marriage and family therapists/counselors, school counselors, and licensed professional counselors. Data are reported regarding the extent to which each of these professional groups has been successful in establishing that their communications with clients are entitled to legal privilege, the scope of privilege extended, and specified exceptions to privilege. Implications for practice are addressed. Counselors are cautioned that existing statutes do not represent absolute guarantees, and that there are certain circumstances under which they are always obligated to breach confidentiality. Finally, four strategies are discussed for counselors desiring to maintain confidentiality when called upon to testify in court: (1) they may explain their code of ethics to the presiding judge and request that privilege be extended to them; (2) if a request for privilege is denied, they may ask that their testimony be heard in camera; (3) they may enter into an attorney-client relationship with the lawyer representing the client's case; and (4) they may testify, or refuse to testify and risk being held in contempt of court. (Author/NB)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED269660

PRIVILEGED COMMUNICATION: LEGAL STATUS & ETHICAL ISSUES

Presented to AACD Convention
Los Angeles, April 1986

By: Barbara Herlihy, University of Houston-Clear Lake
Vernon Lee Sheeley, Western Kentucky University

CG019045

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☑ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Barbara Herlihy

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

ABSTRACT

PRIVILEGED COMMUNICATION: LEGAL STATUS AND ETHICAL ISSUES

Barbara Herlihy and Vernon Lee Sheeley

This report presents findings of research regarding extant privileged communication statutes in the fifty states for selected helping professionals: psychologists, social workers, marriage and family therapists/counselors, school counselors, and licensed professional counselors. Data are reported regarding the extent to which each of these professional groups has been successful in establishing that their communications with clients are entitled to legal privilege; the scope of privilege extended; and specified exceptions to privilege. Implications for practice are addressed. Counselors are cautioned that existing statutes do not represent absolute guarantees, and that there are certain circumstances under which they are always obligated to breach confidentiality. Finally, strategies are discussed for maintaining confidentiality when called upon to testify in court.

PRIVILEGED COMMUNICATION: LEGAL STATUS AND ETHICAL ISSUES

Why is privileged communication important to counselors? Professional codes of ethics provide only general guidelines regarding the counselor's responsibilities in dealing with confidential information, and cannot be relied upon as a means to guarantee the maintenance of confidentiality in specific situations. Problems and limitations arise when other forums, particularly the courts, set conflicting standards (Mabe and Rollin, 1986). Counselors have no legal grounds for upholding their confidentiality pledge when they are called upon to testify in court unless their communications are protected by state privileged communication statutes. This report presents findings of research regarding extant privileged communication statutes in the 50 states for selected helping professionals: psychologists, social workers, marriage and family therapists/counselors, certified school counselors, and licensed professional counselors. Exceptions to privilege, as specified by various state laws, are reported. Implications for ethical and legal practice are discussed.

PSYCHOLOGISTS

The practice of psychologists is regulated in all 50 states. Psychologist/client communications are privileged in 41 (82%) of the 50 states.

Psychologists have quite successfully established that their communications with clients are entitled to privilege; this may reflect that psychologists have clearly established their professional identity.

The scope of privilege extended to psychologists tends to be broad, with 16 states (AL, AZ, AR, DE, GA, ID, KS, KY, MT, NH, NJ, NY, PA, TN, UT, WA)

placing the privilege on the same basis as that between attorney and client, and 7 (LA, ME, MA, NV, OH, OK, WI) placing it on the same basis as that between physician and patient.

SOCIAL WORKERS

Social workers are regulated as a separate profession in 33 states. Of these, the statutes in 26 states include privileged communication provisions. The percentage of regulations including such provisions (over 75%) is comparable to that of psychologists.

However, the scope of the privilege extended to social workers is less broad. All statutes extending privileged communication specify exceptions to that privilege. The statute in only one state (NH) places social worker/client communications on the same basis as those between attorney and client, and this statute also specifies that disclosure may be required by court order. In one state (TN), social worker/client communications are placed on the same basis as those of psychologist/client, with the exception that disclosure may be required when the welfare of children is at issue. The majority of the remaining statutes include the following four exceptions: (1) when the client or legal guardian waives the privilege, (2) when the communication reveals an intent to commit a crime or harmful act, (3) when the communication reveals that a minor client was the victim of a crime including child abuse or neglect, and (4) when the client brings charges against the social worker.

MARRIAGE AND FAMILY THERAPISTS

Marriage and family therapists (also designated marriage, family, and child counselors or marriage counselors) are, much like licensed professional counselors, still in the process of establishing their professional identity.

At the end of 1985, eleven states regulated marriage and family therapy/counseling as a separate and distinct profession. Statutes in only 5 of these 11 states (45.5%) include a privileged communication provision.

That marriage and family therapists have been less successful than psychologists and social workers in establishing privileged communication rights may be indicative of the general reluctance of the courts to extend the communications privilege. By common law tradition, the prevalent assumption has been that the public has a right to every person's evidence. As Wigmore (1961, p.288) has noted, "When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional" (underlining added). Typically, the states have considered the communications in only four relationships (husband/wife, attorney/client, physician/patient, and clergy/penitent) to be of a special nature deserving of privilege.

Given the courts' reluctance to extend privilege to other relationships, and given the relative recency of the movement to establish the separate professional identity of counselors, how successful have counselors been in establishing that their communications with clients should be privileged? First, we will examine the status of privileged communication for school counselors, whose practice is regulated in all 50 states and who have been "on the scene" for many years. Then, we will turn to licensed professional counselors; the licensure movement is more recent and had been successful in 16 states by the end of 1985.

SCHOOL COUNSELORS

All 50 states regulate (certify) school counselors. Privileged communication

statutes exist in 21 of these states, providing protection from disclosure of school counselor/student communications. In 5 of these states (CT, MD, SC, WA, WI), the privilege is strictly limited to those communications relating to student drug and alcohol problems. Statutes regulating privileged communication in the school setting show considerable diversity regarding which professional personnel are included and who may waive the privilege. Statutes in 9 states (IN, IA, KY, ME, NC, ND, SC SD, WA) extend privilege exclusively to the school counselor/student relationship.

Since privileged communication in school counseling pertains to clients who are minor children, some statutes include provisions for involving parents in the decision to waive counselor privilege. Two statues (MI, PA) require parent consent to waive, and 2 other statutes (KY, MT) require student and parent consent. The California statue is unique in that it applies to students aged 12 or older. The statutes in 2 states (IN, OH) advocate almost complete unilateral control by the student to waive the rights of disclosure.

LICENSED PROFESSIONAL COUNSELORS

Of the 16 state counselor licensure laws which had been enacted through the summer of 1985, 11 (AL, AR, ID, MS, MO, MT, NC, OH, OK, TX, VA) contain privileged communication provisions, and 5 (FL, GA, MD, SC, TN) do not.

The APGA Commission on Counselor Licensure, in their model for state legislation concerning the practice of counseling (1976), recommended that licensure laws provide privileged communication between licensed counselors and clients on the same basis as that provided between an attorney and client. Despite this recommendation, the statutes in only two states (AL, AR) guarantee this broad type of privilege.

Exceptions are specified in the counselor licensure laws in the remaining

9 states which provide for privileged communication. Statutes in 7 states (MS, MO, MT, OH, OK, TX, VA) specify that counselors are released from their obligation to maintain privilege when the client waives privilege or voluntarily testifies. Statutes in 5 states (ID, MS, MT, OK, TX) stipulate that clients are considered to have waived privilege when they bring charges against the counselor, either before the licensing board or in a court of law.

Several statutes make exceptions for certain criminal proceedings, such as: when communications reveal the contemplation of a crime or harmful act against self or others (MS, MT, OH, OK); when a minor client is a victim of a crime, including child abuse (MT, OH, OK, VA); or when court proceedings deal with abuse or neglect of a resident of an institution (TX).

Some statutes provide for situations in which clients are unable to make their own decisions. In 4 states (MS, MT, OH, OK), the counselor may testify with the consent of the parent, guardian or administrator of the client's estate when the client is incapacitated or deceased. In Virginia, the counselor may testify when the physical or mental condition of the client is at issue.

Some statutes include exception provisions which are broadly stated and could apply to a variety of circumstances. In 3 states (NC, OH, VA), the counselor's claim to privilege may be denied when the presiding judge compels disclosure in the interest of the administration of justice. In Ohio, counselors are released from their obligation to withhold testimony when the court determines in camera (proceedings which take place privately in the judge's chambers or in court without spectators) that the information is not germaine to the counselor/client relationship.

The situation in Texas is unique in that the licensure law itself contains

no privileged communication provision. However, the rules which govern the operation of the examining board, which have the force of law, do contain such a provision. There are 6 exceptions to privilege under Texas code, including those previously noted and (1) when a counselor or counseling agency sues to collect on a claim for services, (2) when the counselor is conducting a court-ordered examination, and (3) when disclosure is relevant to any suit effecting the parent-child relationship.

IMPLICATIONS FOR PRACTICE

Counselors need to be aware that privileged communication statutes, even when they do exist, do not represent absolute guarantees. Even when counselors' communications are privileged under law, there are circumstances in which they are ethically and/or legally obligated to breach confidence. In addition to exceptions specified by a particular statute, these circumstances always include: when the client requests it, when the court requests it, and when there is clear and imminent danger to the client or others (Zingaro, 1983).

In the absence of statutory privilege, counselors can generally be subpoenaed and required to testify in court regarding communications with clients. Although counselors have limited recourse when they believe that their testimony should not be given, the following strategies are available to them:

1. They may explain their code of ethics to the presiding judge and request that privilege be extended to them. Although, judges have been reluctant to extend privilege to relationships not covered by law, they may be sympathetic to such requests if the counselor can demonstrate that the counseling relationship meets the four requirements established by Wigmore

(1961): (1) the communication must have originated in the confidence that it would not be disclosed, (2) the element of confidentiality must be essential to maintaining the counseling relationship, (3) in the opinion of the community the relationship ought to be sedulously fostered, and (4) the injury to the relationship by disclosure would be greater than the benefit gained for correct disposal of litigation.

2. If a request for privilege is denied, counselors may ask that their testimony be heard in camera.

3. The counselor might enter into an attorney-client relationship with the lawyer representing the client's case, as has been suggested by Stude and McKelvey (1979). However, exercising this option does not necessarily guarantee privileged communication (Hummel, Talbutt, & Alexander, 1985).

4. There remains only one choice available to counselors when they truly believe that withholding their testimony is in the best interests of the client and the counseling relationship, and when all the previously suggested strategies have failed. They may either testify, or refuse to do so and risk being held in contempt of court. To be faced with this choice--either to violate one's ethics or to violate the law--would constitute a difficult dilemma indeed.

In a broad context, it must be recognized that confidentiality, both as a societal value and as an individual interest, does not and cannot exist in a vacuum. The combination of multiple and sometime conflicting considerations--privileged communication law, ethical confidentiality, and societal values--leaves practicing counselors with no easy answers. Yet, it has been noted (Sheeley & Herlihy, 1986) that it is a mark of professionalism to be able to simultaneously weigh these considerations and to make sound judgements which are in the best interests of both the client and others.

References

American Personnel and Guidance Association Commission on Counselor Licensure. (1976). Model for legislation concerning the practice of counseling. D.C.: American Personnel and Guidance Association.

Hummel, D.L., Talbutt, L.C., & Alexander, M.D. (1985). Law and ethics in counseling. New York: Van Nostrand Reinhold.

Mabe, A.R., & Rollin, S.A. (1986). The role of a code of ethical standards in counseling. Journal of Counseling and Development, 64, 294-297.

Sheeley, V.L., & Herlihy, B. (1986). The ethics of confidentiality and privileged communication. Journal of Counseling and Human Service Professions, 1, 141-148.

Stude, E.W., & McKelvey, J. (1979). Ethics and the law: Friend or foe? Personnel & Guidance Journal, 57, 453-456.

Wigmore, J.H. (1961) Evidence, Vol. 3, Sec. 2285. (3rd ed.) Boston: Little, Brown.

Zingaro, J.C. (1983) Confidentiality: To tell or not to tell. Elementary School Guidance & Counseling, 70, 362-367.

PRIVILEGED COMMUNICATION PROVISIONS IN STATUTES/REGULATIONS OF SELECTED HELPING PROFESSIONS

A dash (---) indicates state does not regulate as a separate profession.

STATE

	AL.	AK.	AZ.	AR.	CA.	CO.	CT.	DE.	FL.	GA.	HI.	ID.	IL.	IN.	IA.	KS.	KY.	LA.	ME.	MD.	MA.	MI.	MN.	MS.	MO
Certified School Counselors	NO	NO	NO	NO	YES	NO	YES[1]	NO	NO	NO	NO	YES	NO	YES	YES	NO	YES	NO	YES	YES[1]	NO	YES	NO	NO	NO
Licensed Professional Counselors	YES	--	--	YES	--	--	--	--	NO	NO[2]	--	YES	--	--	--	--	--	--	--	NO	--	--	--	YES	YES
Marriage & Family Therapists	--	--	--	--	YES	--	NO	--	NO	NO[2]	--	--	--	--	--	--	--	--	--	--	--	YES	--	--	--
Psychologists	YES	NO	YES	YES	YES	YES	YES	YES	NO	YES	NO	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES
Social Workers	NO	--	--	YES	YES	YES	--	YES	NO	NO[2]	--	YES	YES	--	YES	YES	YES	YES	YES	YES	YES	YES	--	--	--

STATE

	MT.	NE.	NV.	NH.	NJ.	NM.	NY.	NC.	ND.	OH.	OK.	OR.	PA.	RI.	SC.	SD.	TN.	TX.	UT.	VT.	VA.	WA.	WV.	WI.	WY.
Certified School Counselors	YES	NO	YES	NO	NO	NO	NO	YES	YES	YES[2]	YES	YES	YES	NO	YES[1]	YES	NO	NO	NO	NO	NO	YES[1]	NO	YES[1]	NO
Licensed Professional Counselors	YES	--	--	--	--	--	--	YES	--	YES[2]	YES	--	--	--	NO[2]	--	NO[2]	YES	--	--	YES	--	--	--	--
Marriage & Family Therapists	--	--	NO	--	YES	--	--	YES	--	--	--	--	--	--	NO[2]	--	NO[2]	--	YES	--	--	--	--	--	--
Psychologists	YES	NO	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	NO	NO	YES	YES	YES	YES	NO	YES	YES	NO	YES	YES
Social Workers	YES	--	--	YES	--	--	YES	NO	NO	YES[2]	YES	YES	--	NO	NO	YES	YES	YES	YES	--	YES	--	YES	--	--

[1] Privilege limited to student drug and alcohol problems.
[2] Professions regulated under same state act.

BEST COPY AVAILABLE